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this Memorandum Decision shall not be  
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establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOUGLAS J. NILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A05-0606-CR-297
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE CASS SUPERIOR COURT  
The Honorable Thomas Perrone, Judge  
Cause No. 09D01-0502-FD-32

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**March 14, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Douglas J. Nilson appeals his conviction for the Class D felony battery of his nine-year-old son. Specifically, he contends that the trial court erred in admitting a photograph of his son lying on a backboard in a neck brace into evidence. Because the probative value of the photograph is not substantially outweighed by the danger of unfair prejudice, we affirm the trial court.

## **Facts and Procedural History<sup>1</sup>**

In February 2005, brothers ten-year-old Co.N., nine-year-old Ca.N., and six-year-old Cod.N. lived with their father, Nilson, in Logansport, Indiana. The boys shared the same bedroom. On February 11, 2005, Nilson told the boys to clean their bedroom before they went to their mother and stepfather's house for the weekend. Ca.N. told his father "no," at which point Nilson became angry, grabbed Ca.N. by the neck, spun him around, and slammed him onto the floor. Nilson then grabbed Co.N. by the chin and spun him around, causing him to strike his jaw on an open dresser drawer. Nilson did not touch Cod.N. A few minutes later, the boys' stepfather arrived as scheduled and took them to the Shrine Club, where their mother was working.

When the boys saw their mother at the Shrine Club, they were upset and crying. The boys told their mother what happened, and she took them to the emergency room to be examined. She also reported the incident to the police.

Thereafter, the State charged Nilson with two counts of Class D felony battery resulting in bodily injury.<sup>2</sup> Count I alleged battery to Ca.N., and Count II alleged battery

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<sup>1</sup> We note that in the Statement of the Facts, Nilson's appellate attorney did a witness-by-witness summary of the testimony, which Indiana Appellate Rule 46(A)(6)(c) prohibits.

to Co.N. At Nilson's jury trial, the State offered into evidence State's Exhibit 2, a photograph of Ca.N. lying on a backboard in a neck brace. Nilson objected on grounds that the photograph was "prejudicial." Tr. p. 151. The trial court overruled Nilson's objection and admitted State's Exhibit 2 into evidence. The jury found Nilson guilty of Count I but not guilty of Count II, and the trial court sentenced him to eighteen months with ninety days executed in the county jail and fifteen months on probation. Nilson now appeals his conviction.<sup>3</sup>

### **Discussion and Decision**

Nilson raises one issue on appeal. Specifically, he contends that the trial court erred in admitting State's Exhibit 2, the photograph of Ca.N. lying on a backboard in a neck brace, into evidence. Generally, photographs depicting injuries of a victim or demonstrating the testimony of a witness are relevant and admissible. *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005) (citing Ind. Evidence Rules 401 and 402; *Allen v. State*, 686

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<sup>2</sup> Ind. Code § 35-42-2-1(a)(2)(B).

<sup>3</sup> On January 16, 2007, after briefing was completed in this case, Nilson's appellate attorney filed a Motion To Remand to the Cass Superior Court 1 "pursuant to Trial rule 37A . . . for the limited purpose of considering Appellant's Motion to Modify Sentence." According to Nilson's Motion to Remand, Nilson was seeking "A misdemeanor treatment" and "supervised parenting time" in his Motion to Modify Sentence. We first note that Indiana Trial Rule 37(A) addresses motions for orders compelling discovery. Indiana Appellate Rule 37(A), on the other hand, provides:

At any time after the Court on Appeal obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court . . . for further proceedings. The motion must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice.

Here, Nilson's motion is not verified. *See* Ind. Trial Rule 11(B) (requiring statement, "I (we) affirm under the penalties for perjury, that the foregoing representation(s) is (are) true."). In addition, Nilson has not attempted to demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice. We therefore deny this motion.

N.E.2d 760, 776 (Ind. 1997), *reh'g denied*), *reh'g denied*, *cert. denied*, 126 S. Ct. 2936 (2006). However, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” Ind. Evidence Rule 403. On appeal, a claim of error in the admission or exclusion of evidence will not prevail “unless a substantial right of the party is affected.” Ind. Evidence Rule 103(a). Whether an appellant’s substantial rights are affected is determined by examining the “probable impact of that evidence upon the jury.” *Pruitt*, 834 N.E.2d at 117. Because the balance of prejudice and probative value of evidence falls within the sound discretion of the trial court, this Court reviews the admission of photographic evidence only for an abuse of discretion. *Id.*

Here, the photograph demonstrated Ca.N.’s testimony concerning his injuries and the treatment he received at the hospital. Specifically, Ca.N. testified that following the incident, he experienced pain on the back of his head and in his neck and back. He also had bruising on his side. Ca.N. explained that while he was at the hospital, medical personnel examined him for broken bones; therefore, they put the brace around his neck to keep him as still as possible. Luckily, Ca.N. ended up not having any broken bones and checked out okay.

As such, State’s Exhibit 2 was probative in that it helped explain Ca.N.’s testimony concerning his injuries and treatment. Nevertheless, Nilson argues that because Ca.N. checked out okay, the State only used this photograph to appeal to the sympathies of the jury. However, the jury was told that Ca.N. did not have any broken bones. Therefore, contrary to Nilson’s assertion on appeal, he was not put “in a position

where he had to defend against an injury he did not inflict.” Appellant’s Br. p. 16. Accordingly, we conclude that the probative value of the photograph is not substantially outweighed by the danger of unfair prejudice. As most evidence admitted by the opposing party is, State’s Exhibit 2 was prejudicial. However, it was not unfairly prejudicial. The trial court did not abuse its discretion in admitting the photograph into evidence.

Affirmed.

BAILEY, J., and BARNES, J., concur.